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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

YEWHALA ESHET ABEBE,

Defendant and Appellant.

H034550

(Santa Clara County

Super. Ct. No. 155756)

Yewhala Eshet Abebe (defendant) appeals from the denial of his motion to withdraw a guilty plea in a 1992 case.¹ We appointed counsel to represent him on appeal. Counsel filed a brief that set forth the facts and procedural history of the case. Counsel presented no argument for reversal but asked this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. On December 9, 2009, we notified defendant of his right to submit written argument on his own behalf within 30 days.

On January 11, 2010, defendant submitted a five-page letter to this court in which he detailed the events that transpired back in 1992 before he entered guilty pleas to two counts of lewd and lascivious conduct on a child. (Pen. Code, § 288, subd. (a).)

¹ We have taken judicial notice of our unpublished opinion H011367 and court records in Santa Clara County Superior Court case No. 155756.

We glean from this letter that from defendant's perspective he believes that the preliminary hearing testimony was "coached and . . . pure fabrication"; essentially, his attorney provided ineffective assistance at the preliminary hearing; when a new attorney was appointed he did not utilize a translator to communicate with defendant and defendant's *Marsden* motion to replace his attorney should have been granted; after his trial started, defense counsel again did not utilize a translator to communicate with defendant so defendant did not know what was going on; he was coerced by the court into entering guilty pleas because he did not understand what was going on; and it was error for the trial court to deny his motion to withdraw his guilty pleas.

Background

On July, 22, 1992, defendant pleaded guilty to two counts of committing lewd and lascivious conduct on a child with the understanding that a third felony count alleging forcible lewd and lascivious conduct on a child (Pen. Code, § 288, subd. (b)) would be dismissed. On August 28, 1992, the trial court suspended imposition of sentence and admitted defendant to probation subject to various conditions, including a one-year county jail term and an order requiring defendant to register as a sex offender under Penal Code section 290.

Over five months later, on February 9, 1993, defendant filed a motion to withdraw his pleas pursuant to Penal Code section 1018. The court heard and denied the motion on May 7, 1993.

Defendant's notice of appeal, filed June 2, 1993, stated that the appeal was from " 'the denial of the Petition for Writ of Coram Nobis heard before the . . . court on May 7, 1993.' " This court held that the motion for withdrawal did not qualify as a petition for writ of *coram nobis*. Rather, the motion to withdraw a plea before judgment is a statutory motion governed by Penal Code section 1018. As such it was an appealable order.

However, this court found that defendant did not enter his guilty pleas until after jury trial had commenced and the jury had been selected. At the change of plea hearing

on July 22, 1992, defendant was aided by an interpreter, who translated the proceedings on a "word for word" basis. When questioned by the court through the interpreter, defendant indicated he understood the elements of the charged offenses and the consequences of his guilty pleas. Defendant was advised of and waived his constitutional rights, and told the court that he was pleading guilty freely and voluntarily. In addition, defense counsel informed the court that he had "very extensive[]" discussions with defendant about the case and its ramifications. Among other things, counsel had explained the elements of the crimes and any possible defenses as well as defendant's constitutional right and the consequences of defendant's guilty pleas.

This court contrasted the information contained in the record with defendant's testimony at the change of plea hearing. Through an interpreter, defendant testified that he was factually innocent and had wanted to continue with the jury trial. Similar to the claims defendant makes in his January 11, 2010 letter to this court, defendant claimed that his guilty pleas were the result of language problems, ignorance of the law, confusion, and the wrong advice and coercion by defense counsel. Specifically, defendant testified that on July 22, 1992, he conversed with his attorney in the holding cell without benefit of an interpreter. He did not agree to plead guilty during this conversation. When called into the courtroom, defense counsel advised him that "the only way he could get out" would be to plead guilty. Before he understood what was going on, the judge was "explaining." During the court's voir dire, defendant attempted to ask his lawyer some questions; however, defense counsel "was telling me what he wanted and my only means of communication was through the interpreter." Defendant became confused, and took the attorney's advice because he was not in "a state of mind that would enable [him] to make a sound decision." Despite the fact that he was aided by an interpreter during the change of plea hearing, defendant believed that he had no choice but to plead guilty.

On cross-examination, defendant testified that he had graduated from high school in Ethiopia. He had been in the United States for eight years. During this time, he attended several semesters of college at San Jose City College; the classes he took there were conducted in English. Defendant had held several jobs in this country and had spoken English during his six years of employment. Further, when interviewed by a police detective about this case, he was questioned in English. He understood the detective's questions and answered him in English.

Defendant had spoken to defense counsel on several occasions before coming to court on July 22, 1993. Counsel had questioned defendant about the case and given defendant an "overall view" of the legal proceedings. Defendant understood that he had a right to a jury trial. Defendant had spoken with counsel on three occasions prior to July 22. Although defendant was not always satisfied with counsel's answers, the attorney had answered all his questions. When the judge asked whether he wished to give up his right to a court trial at the July 22 hearing, defendant told defense counsel that he wanted to "go through [with] the court trial," but his attorney said, "no."

The interpreter at the change of plea hearing was the same person who served as the interpreter at the motion to withdraw. Defendant was able to understand the interpreter at the motion to withdraw, but was confused on the day he entered his guilty pleas. In view of his confused mental state, he had answered the judge's questions to the best of his ability. Although defendant admitted defense counsel had not told him he had to plead guilty and had no right to a trial, defendant claimed that his attorney had forced him to take a position contrary to his desire to continue trial.

At the hearing on defendant's motion to withdraw his plea in 1993, the trial court took judicial notice of the transcript of the change of plea hearing. After indicating it had reviewed that transcript, the court denied defendant's motion to withdraw his pleas.

This court concluded that the trial court had not abused its discretion in denying defendant's motion to withdraw his plea because "there was no independent evidence

supportive of defendant's self-serving assertions. Moreover, defendant's testimony . . . contain[ed] inherent contradictions. Although defendant had lived in this country for eight years, had attended college courses conducted in English, had spoken English at his place of employment over a six-year period, and had been able to communicate in English with a police detective about the underlying charges, defendant professed an inability to sufficiently communicate in English when discussing the plea negotiations with his attorney on July 22. Defendant's assertion that his free will had been overborne was also contradicted by the record of the change of plea hearing where defendant, aided by an interpreter, had informed the court that he had discussed the case with his attorney and was pleading guilty 'freely and voluntarily.' Defense counsel also had represented to the court that he and defendant had had extensive discussions concerning the case, including an explanation of the elements of the offenses, possible defenses, and constitutional rights."

Thereafter, defendant, who is not a United States citizen, became the subject of removal proceedings. (See *Abebe v. Mukasey* (9th Cir. 2002) 554 F.3d 1203, 1204.)

Subsequently, on June 8, 2009, defendant filed a petition for writ of habeas corpus in Santa Clara Court Superior Court alleging 1) that he received ineffective assistance of counsel in his 1992 case; 2) that he was denied counsel because the court denied his *Marsden* motion and when he attempted to withdraw his guilty pleas; and 3) his due process rights were violated. On June 16, 2009, in Santa Clara County Superior Court defendant, in propria persona, filed another motion to withdraw his plea pursuant to Penal Code section 1018.

In this most recent Penal Code section 1018 motion, defendant made essentially the same allegations that he made in his 1993 motion to withdraw his plea.

On June 17, 2009, the superior court denied defendant's motion to withdraw his plea and denied the petition for writ of habeas corpus relying on our Supreme Court's

opinions in *People v. Kim* (2009) 45 Cal.4th 1078 (*Kim*) and *People v. Villa* (2009) 45 Cal.4th 1063 and this court's opinion in *People v. Chien* (2008) 159 Cal.App.4th 1283.

Discussion

Habeas Relief

Defendants "who have completely served their sentence and also completed their probation or parole period, may not challenge their underlying conviction in a petition for a writ of habeas corpus because they are in neither actual nor constructive custody for state habeas corpus purposes." (*Kim, supra*, 45 Cal.4th at p. 1108.)

To put it another way "a person in federal immigration detention is ineligible for a writ of habeas corpus from a state court if his state sentence and probation or parole have been completed." (*Kim, supra*, 45 Cal.4th at p. 1084.) The key prerequisite to gaining relief on habeas corpus is a petitioner's custody status. Defendant is no longer in custody or on probation for his 1992 offenses. Thus, the trial court did not err when it denied defendant's petition for writ of habeas corpus.

Motion to Withdraw Plea

Defendant's statutory motion to withdraw his plea is untimely. Penal Code section 1018 provides in pertinent part, "Unless otherwise provided by law, every plea shall be entered or withdrawn by the defendant himself or herself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him or her of the right to counsel and unless the court shall find that the defendant understands the right to counsel and freely waives it, and then only if the defendant has expressly stated in open court, to the court, that he or she does not wish to be represented by counsel. *On*

application of the defendant at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended, the court may, and in case of a defendant who appeared without counsel at the time of the plea the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted."² (Italics added.)

When defendant made his motion to withdraw his plea in 1993, this court treated his motion as a statutory motion under Penal Code section 1018 as it was made within six months of his grant of probation. However, now that motion is no longer available to defendant since it was made more than 17 years after the superior court's order granting probation. A trial court lacks jurisdiction to grant a motion to withdraw guilty pleas following a grant of probation after the statutory six-month period has passed. (*People v. Miranda* (2004) 123 Cal.App.4th 1124, 1129-1134.) Since defendant's motion was not timely, the trial court could properly have denied it on that basis.

Even if this court decided to treat defendant's motion to withdraw his pleas as a statutory motion to vacate under Penal Code section 1016.5, at no time in the trial court did defendant assert in his motion to withdraw his pleas that that he was not advised of the immigration consequences of his pleas.³ His failure to raise this claim below results

² Penal Code section 1018 was amended in 1991 to provide, as it does now and at the time of defendant's convictions, that in cases in which probation is granted and entry of judgment is suspended, the withdrawal motion must be made within six months after the order granting probation is made. (Stats.1991, ch. 421, § 1, p. 2172.)

³ Penal Code section 1016.5, enacted in 1977, by Statutes 1977, chapter 1088, section 1, became effective January 1, 1978. (*People v. Trantow* (1986) 178 Cal.App.3d 842, 844, fn. 1.) "Subdivision (a) thereof requires that, prior to accepting a guilty or no contest plea to an offense not an infraction, a court must *advise* the defendant concerning specified immigration consequences. Subdivision (b) provides a remedy when a court fails to give the requisite advisements and the plea may have a specified immigration consequence(s): a defendant may *move to vacate* the judgment, withdraw said plea, and enter a plea of not guilty." (*People v. Carty* (2003) 110 Cal.App.4th 1518, 1524-1525.)

in waiver of this claim on appeal.⁴ (*In re Marriage of King* (2000) 80 Cal.App.4th 92, 117 [issues or theories not properly raised in the trial court will not be considered by the appellate court; failure to present a matter in trial court waives right to do so on appeal].) In any event, the record from defendant's change of plea hearing on July 22, 1992, would belie any such claim.

Pursuant to *People v. Wende, supra*, 25 Cal.3d 436, we have reviewed the entire record and have concluded that there are no arguable issues on appeal.

Disposition

The June 17, 2009 order of the superior court denying defendant relief is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.

⁴ Defendant did raise the claim that trial counsel did not inform him of the immigration consequences of his pleas when he alleged ineffective assistance of counsel in his petition for writ of habeas corpus, but as noted, defendant is no longer in state custody.